No. 80472-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

(COURT OF APPEALS NO. 35247-8-II)

CHARLES SALES and
PATRICIA SALES, a married couple,

Respondents,

v.

WEYERHAEUSER COMPANY,
a Washington corporation,

Petitioner.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

Matthew P. Bergman
Brian F. Ladenburg
Bergman & Frockt
614 First Avenue, Fourth Floor
Seattle, WA 98104
Telephone (206) 957-9510
Fax (206) 957-9549

John W. Phillips
Matthew Geyman
Phillips Law Group, PLLC
315 Fifth Avenue S. Suite 1000
Seattle, WA 98104
Telephone (206) 382-6163
Fax (206) 382-6168

Counsel for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Washington Cases

Washington Court Rules

Federal Statutes

Other Authorities

I. INTRODUCTION

This is a simple case where the Court of Appeals required Weyerhaeuser to prove that the forum it proposed as more convenient – Arkansas state court – would truly be a real alternative to the Washington state court where plaintiff Charles ("Joby") Sales filed his suit. Joby Sales is dying from mesothelioma caused by Weyerhaeuser's asbestos fibers that his father unwittingly carried home on his work clothes and which Joby inhaled as a little boy in the Sales' home. He filed this case against Weyerhaeuser in Washington state court so that he might live to testify at his trial by avoiding Weyerhaeuser's removal of the case to federal court, followed by its transfer to the asbestos Multi-District Litigation ("MDL") in the Eastern District of Pennsylvania where it was sure to languish until long after he died. *See Sales v. Weyerhaeuser Co.*, 138 Wn. App. 222, 232-34 (2007). Mr. Sales willingly accepted the relative burden to his family of suing in Washington, and he had a valid basis for litigating against Weyerhaeuser in Washington state where Weyerhaeuser has its corporate headquarters, where key corporate environmental safety decisions were made and where important witnesses – including both current and former Weyerhaeuser corporate employees – reside. *See* CP 199-201, 222-224, 249 and 275-276.

Mr. Sales demonstrated that if he filed his case in Arkansas state court, Weyerhaeuser would remove it to federal court and then transfer it to the MDL in Pennsylvania. Weyerhaeuser, through its

strategic silence, virtually admitted its mean-spirited strategy. *See Sales*, 138 Wn. App. at 234.

In its Petition for Review ("Petition"), Weyerhaeuser ignores completely the overwhelming evidence of its strategy to transfer the case to the MDL, where it would languish. In the face of that evidence, the Court of Appeals simply held that to prove that Arkansas state court is a more convenient forum, Weyerhaeuser was required to agree to litigate the case in Arkansas state court.

Weyerhaeuser seeks here to elevate to "constitutional" status its strategy of delaying trial until after Mr. Sales has died. This Court should promptly reject the Petition for a number of reasons. First, the Court of Appeals' decision follows established Washington law requiring a moving defendant to prove that its alternative forum is real, and authorizing courts to condition a *forum non conveniens* dismissal on the defendant's agreement to litigate in its proposed alternative forum. Second, Weyerhaeuser has no "constitutional" right of removal, and thus its arguments under the Supremacy Clause and the "unconstitutional conditions doctrine" have no application here.[1] And third, once this Court strips Weyerhaeuser's arguments of their hyperbole, the Court should conclude that there is no public interest in accepting review. The Court of Appeals simply held that to prove that

[1] Given Mr. Sales' precarious health, he has filed concurrently with this Answer a Motion for Expedited Decision on Weyerhaeuser's Petition for Review so that his case can proceed to trial as soon as possible.

Arkansas state court is a more convenient forum, Weyerhaeuser was required to agree to litigate the case in Arkansas state court. To require less would subvert the purposes of the *forum non conveniens* doctrine and allow a corporate defendant to use the alleged "convenience" of a proposed alternative forum to achieve impermissible ends. Accordingly, the Court should deny the Petition.

II. BACKGROUND

Plaintiff Joby Sales is a 23-year-old husband and father who is dying from mesothelioma caused by asbestos fibers that his father unwittingly carried home on his work clothes. *Sales*, 138 Wn. App. at 225-26; CP 6-7. Mr. Sales filed this case against Weyerhaeuser in Pierce County Superior Court so that he might live to testify at his trial — his only bequest to his young family. Because he is an Arkansas citizen and Weyerhaeuser is a Washington corporation, if he had filed the case in Arkansas state court, Weyerhaeuser could have removed it to federal court based on diversity jurisdiction and transferred it to the Asbestos MDL in the Eastern District of Pennsylvania, where it would languish until long after Mr. Sales died. *See* 28 U.S.C. §§ 1332 and 1441(a). However, by filing the case in Washington, Weyerhaeuser's home state, Mr. Sales prevented Weyerhaeuser from removing the case to federal court and thus avoided the procedural quagmire of the MDL. *See* 28 U.S.C. § 1441(b) (providing that a defendant may not remove a case based on diversity jurisdiction when the defendant is a citizen of the state in which the case is filed).

After Mr. Sales filed this case in Washington, Weyerhaeuser successfully moved to dismiss the case on *forum non conveniens* grounds, but the Court of Appeals reversed that dismissal because Weyerhaeuser refused to stipulate to allow the case to be tried in Arkansas state court instead of removing and transferring it to the MDL proceeding. *Sales*, 138 Wn. App. at 234-35. The Court of Appeals noted the substantial record evidence indicating that the MDL is a "procedural black hole" where cases "languish indefinitely." *Id.* at 232-34. In so ruling, the Court of Appeals agreed with federal courts that have reached the same conclusions about the Asbestos MDL morass. *See, e.g., Madden v. Able Supply Co.*, 205 F. Supp. 2d 695, 702 (S.D. Tex. 2002); *In re Maine Asbestos Cases*, 44 F. Supp. 2d 368, 374 n.2 (D. Me. 1999). The Court of Appeals held that this evidence, combined with Weyerhaeuser's refusal to stipulate to the Arkansas state court forum, "compels us to conclude that Weyerhaeuser failed to establish that Arkansas was truly an adequate forum." *Id.* at 234. The Court of Appeals then denied Weyerhaeuser's motion for reconsideration of the Court of Appeals' decision, thus leading to the present Petition by Weyerhaeuser.

III. ARGUMENT

A. Standard for Discretionary Review.

Weyerhaeuser seeks review under Rule 13.4(b) of the Washington Rules of Appellate Procedure, which provides:

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

Under this rule, review is appropriate *only* if the Court of Appeals' decision conflicts with a prior decision of this Court or of the Court of Appeals, if it raises a significant constitutional question, or if it raises an issue of substantial public interest warranting review by this Court. *Id.* As demonstrated below, Weyerhaeuser can not meet any of these conditions to justify review.

B. The Court of Appeals' Holding that the Trial Court Abused its Discretion When it Failed to Require Weyerhaeuser to Prove That its Proposed Alternative Forum Was Truly Available Is Consistent with Established Washington Case Law.

Weyerhaeuser claims that the Court of Appeals somehow altered the *forum non conveniens* test by requiring Weyerhaeuser to prove that its proposed alternative forum of Arkansas state court was truly available. Petition at 18. Yet it is boilerplate Washington law that a defendant must first prove that the proposed alternative forum is truly adequate. *Sales*, 138 Wn. App. at 228. As the Court of Appeals stated in *Hill v. Jawanda Transport*, "[a] defendant bears the burden of proving an adequate alternative forum exists." *Hill v. Jawanda*

Transport Ltd., 96 Wn. App. 537, 541, 983 P.2d 666 (1999) (citing *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 677 (D.C. Cir. 1996)); *id.* at 543 ("*Once a defendant proves that another forum is adequate*, the trial court must analyze and balance private and public interests") (emphasis added); *Klotz v. Dehkhoda*, 134 Wn. App. 261, 265, 141 P.3d 67 (2006) ("In deciding whether to dismiss for *forum non conveniens*, the trial court ***must*** first determine whether an adequate alternative forum exists") (emphasis added); *see also El-Fadl*, 75 F.3d at 676-77 ("In deciding a *forum non conveniens* motion, the district court ***must*** first establish that there is an adequate alternative forum . . . Only if there is an adequate alternative forum must the court then weigh the relative conveniences to the parties . . .") (emphasis added). Thus, the Court of Appeals followed well-established Washington case law by requiring Weyerhaeuser to prove that the forum it was proposing was the forum where the case would be litigated.

Weyerhaeuser could not meet this burden of proof simply by showing that it is amenable to service of process in Arkansas, as Weyerhaeuser suggests in its Petition at 9. While Weyerhaeuser claims that the Court of Appeals departed from accepted practice by requiring Weyerhaeuser to stipulate to litigate in Arkansas state court, the conditional dismissals authorized by Washington appellate courts have gone beyond requiring the defendant to stipulate to jurisdiction but have required them to forfeit substantive defenses, such as the statute of limitations defense, as a condition of granting such a

dismissal. *See, e.g., Werner v. Werner*, 84 Wn.2d 360, 371, 526 P.2d 370 (1974) (conditioning dismissal on defendant's stipulations to submit to jurisdiction in California and not to plead an available statute of limitations defense). The Court of Appeals' approach in this case simply confronted and rejected Weyerhaeuser's devious strategy to change the forum in order to remove and transfer the case to the MDL where it would languish until after Mr. Sales' death. The Court of Appeals noted that the conclusion that Arkansas is a more appropriate forum is "meaningless if Weyerhaeuser removes the Arkansas state court action to federal court where it is then transferred to the Multi-District Litigation in Pennsylvania." 138 Wn. App. at 231.[2] That the Court of Appeals thus required the *forum non conveniens* analysis to be practical and not theoretical is perfectly consistent with Washington law.

Moreover, a trial court "necessarily abuses its discretion if its ruling is based on an erroneous view of the law." *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 530, 20 P.3d 447 (2001)). *See Sales,*

[2] Throughout its appeal, Weyerhaeuser has suggested that Mr. Sales could defeat removal of his Arkansas case by adding a local defendant. *See* Petition at 10. The argument is irresponsible. Weyerhaeuser has never suggested who that local defendant in Arkansas might be and how such a ploy would not run afoul of the fraudulent joinder doctrine, which Weyerhaeuser would surely invoke if Mr. Sales followed its suggestion. *See, e.g., Maves v. Rapoport*, 198 F.3d 457 (4th Cir. 1999) (permitting removal notwithstanding citizenship of non-diverse defendant based on demonstration that there is no possibility that plaintiff could establish its claim or claims against that non-diverse defendant in state court).

138 Wn. App. at 308. While Weyerhaeuser says that the trial court understood the law (Petition at 14), there is simply no question that the trial court believed erroneously that it could not consider the evidence of Weyerhaeuser's MDL strategy and lacked legal authority to require Weyerhaeuser to agree to submit to Arkansas state court as a condition of its dismissal. As the Court of Appeals held:

> In dismissing Sales's case, the trial court voiced its concern that "the delays and inconvenience of handling this case through the system established by the [f]ederal [c]ourts in Pennsylvania[ ] would be a significant prejudice to [Sales]." CP at 161. It concluded that "it would be in the interest[ ] of justice to have this case tried in the county and location where the incident occurred, where the majority of the factual witnesses are located, and where [Sales] resides." CP at 161. Yet it believed that it could not "speculate on whether . . . this case would be removed to [f]ederal court . . . or [about] the status . . . of cases relating to this subject matter in the [f]ederal system." CP at 161. Moreover, it stated that it did not know of any law that would allow it to retain jurisdiction solely because of the potential delays if Weyerhaeuser removed the case to federal court.

Sales, 138 Wn. App. at 231-32; *see also id.*, at 226.

Thus, the trial court quite plainly believed it could not consider the evidence of Weyerhaeuser's MDL strategy and that it lacked authority to condition dismissal on Weyerhaeuser's agreement to litigate in Arkansas state court to thwart that strategy – which it agreed would be prejudicial to Mr. Sales. Such errors clearly constitute an abuse of discretion under Washington law, as the Court of Appeals correctly held.

C. Conditioning Dismissal on Weyerhaeuser's Agreement that the Case would Proceed in Weyerhaeuser's Proposed Forum Does Not Raise a Significant Constitutional Question.

As discussed above, Washington appellate courts authorize trial courts to condition dismissal on a defendant's agreement to forego a substantive or procedural right. *See Werner v. Werner, supra.* Yet despite this established principle and Weyerhaeuser's own concession that a trial court may condition dismissal on defendant's agreement to submit to jurisdiction in the alternative forum (*see* Brief of Respondent, dated January 22, 2007 at 33), Weyerhaeuser claims that the Court of Appeals' conditional dismissal here somehow violated the Supremacy Clause and constitutes an "unconstitutional condition." Petition at 10-13. The gravity of this "constitutional" problem was apparently so great that Weyerhaeuser never raised it in the trial court, it failed to suggest any constitutional issue to the Court of Appeals until reconsideration, and it never uttered the phrase "unconstitutional conditions" until it filed this Petition. As discussed below, the Court of Appeals' decision does not engage any constitutional issue at all, and Weyerhaeuser cannot establish this ground for review.

First, Weyerhaeuser has no right to remove the case to federal court because the case was filed in *Washington* where removal is prohibited regardless of whether diversity of citizenship exists. *See* 28 U.S.C. § 1441(b) (case is not removable where, as here, defendant "is

a citizen of the State in which such action is brought").[3] Because Weyerhaeuser is a Washington corporation that was sued in Washington, it has no right, let alone a constitutional right, to remove this case to federal court. The Court of Appeals' requirement that dismissal be conditioned on Weyerhaeuser's stipulation to proceed in Arkansas state court thus did not require Weyerhaeuser to waive any "constitutional" or other right to remove this case to federal court because Weyerhaeuser has no such right in the first place. The Court of Appeals gave Weyerhaeuser two options. It could proceed in Washington Superior Court where the case was filed and as to which there is no right of removal, or it could agree to dismissal conditioned upon litigating in its proposed alternative forum. The case does not involve the Supremacy Clause, because Weyerhaeuser did not have the right to remove in the first place.

Nor does the Court of Appeals' decision implicate the antiquated "unconstitutional conditions doctrine." Even if conditional dismissal implicated the right of removal that right is not constitutional. The "unconstitutional conditions doctrine" holds that "the government may not require a person to give up a constitutional

[3] The purpose of removal based on diversity jurisdiction is "to provide a federal forum for *out-of-state* litigants where they are free from prejudice in favor of a local litigant." *Tosco Corp. v. Communities for a Better Environment*, 236 F.3d 495, 502 (9th Cir. 2001) (emphasis added). Thus, "[t]he need for such protection is absent . . . in cases where [as here] the defendant is a citizen of the

right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the [right lost]." *Dolan v. City of Tigard,* 512 U.S. 374, 385, 114 S.Ct. 2309 (1994) (choice between building permit and Fifth Amendment right to just compensation for a taking). To make out an "unconstitutional conditions" claim, Weyerhaeuser must show that a constitutional right has been infringed. *Sanchez v. County of San Diego,* 464 F.3d 916, 930-31 (9th Cir. 2006); *Vance v. Barrett,* 345 F.3d 1083, 1088 (2003) ("As a prerequisite to discerning a constitutional violation for an unconstitutional condition or unconstitutional retaliation, however, we must first examine the validity of the underlying alleged constitutional rights.").

The key flaw in Weyerhaeuser's argument is that the right of removal is *statutory* — not constitutional — and federal courts generally strictly construe that statutory right *against* permitting removal.

Weyerhaeuser cites primarily 19th Century cases of dubious modern significance[4] to claim that it has a constitutional right to federal diversity jurisdiction. Petition at 12. The most modern case

---

state in which the case is brought." *Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933, 940 (9th Cir. 2006).

[4] *See Koslow v. Pennsylvania,* 302 F.3d 161, 173 (3d Cir. 2002) (describing cases cited by *Weyerhaeuser* as "select seminal-and dated-'unconstitutional conditions' cases, when the Supreme Court struck down states' attempts to force certain litigants to waive immunity from suit in state court." (citing *Barron v. Burnside*, 121 U.S. 186, 199, 7 S.Ct. 931 (1887) and *Home Ins. Co. v. Morse*, 20 Wall. 445, 87 U.S. 445 (1874)).

Weyerhaeuser can find is *Terral v. Burke Construction Co.*, 257 U.S. 529, 532, 42 S.Ct. 186 (1922).[5] However, shortly after *Terral,* the United States Supreme Court decided *Kline v. Burke Construction Co.*, 260 U.S. 226, 43 S.Ct. 79 (1922), where it made clear that there is no *constitutional right* to have a case heard in federal court:[6]

> The right of a litigant to maintain an action in a federal court on the ground that there is a controversy between citizens of different states is not one derived from the Constitution of the United States, unless in a very indirect sense. Certainly it is not a right granted by the Constitution. The applicable provisions, so far as necessary to be quoted here, are contained in article III. Section 1 of that article provides:
>
> 'The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.'
>
> By section 2 of the same article it is provided that the judicial power shall extend to certain designated cases and controversies and, among them, 'to controversies * * * between citizens of different states. * * *' The effect of these provisions is not to vest jurisdiction in the inferior courts over the designated cases and controversies but to delimit those in respect of which Congress may confer jurisdiction upon such

[5] The unconstitutional conditions doctrine developed during the *Lochner* era in response to state legislation that imposed discriminatory conditions on foreign corporations, and, after the collapse of *Lochner* jurisprudence in the mid-1930s, the doctrine remained dormant for almost two decades. Timothy C. Layton, *Note, Welfare for Lobbyists or Non-profit Gag Rule: Can Congress Limit a Federal Grant Recipient's Use of Private Funds for Political Advocacy?,* 47 SYRACUSE L. REV. 1065, 1077-78 (1997).

[6] *See Federalism in the Taft Court Era: Can it be "Revived"?*, 51 DUKE L.J. 1513, 1639 n. 257 (2002) ("In *Kline* . . . the Court corrected Taft's enthusiastic implication that the right to resort to federal courts, whether by filing a cause of action or by removal, was a constitutional right."

> courts as it creates. Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. . . . The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. . . . And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part . . . . A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, cannot well be described as a constitutional right.

Id. at 233-34 (citations and footnote omitted); *see also Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 585, 119 S.Ct. 1563, 1570 (1999) (holding that issue of complete diversity of citizenship "rests on statutory interpretation, not constitutional demand"). Thus, to the extent that Weyerhaeuser relies on *Terral* to establish a constitutional right to removal, the United States Supreme Court – within months of that 85-year-old decision – clarified that no such constitutional right to removal exists, and Weyerhaeuser cites no more modern precedent supporting a different conclusion. *See also Note, Unconstitutional Conditions,* 73 HARV. L. REV. 1595, 1609 (1960) (noting that *Terral* was further vitiated by *Railway Express Agency, Inc. v. Virginia,* 282 U.S. 440 (1931), which upheld a Virginia law that required foreign corporations to register as local corporations, thus destroying diversity and indirectly the foreign corporation's right to remove).

Removal jurisdiction is thus derived not from the Constitution but rather "entirely from the statutory authorization of Congress," and, what is more, "removal statutes are strictly construed *against* removal." *Libhart v. Santa Monica Dairy Co.,* 592 F.2d 1062, 1064 (9th Cir. 1979). Accordingly, "courts are rigorously to enforce Congress' intent to *restrict* federal jurisdiction in controversies between citizens of different states." *Miera v. Dairyland Ins. Co.,* 143 F.3d 1337, 1339 (10th Cir. 1995). In short, a defendant's right, if any, to remove a case to federal court is statutory, not constitutional. *Milk 'N' More, Inc. v. Beavert*, 963 F.2d 1342, 1345-46 (10th Cir.1992). Consistent with these authorities, some courts refer to removal in diversity cases as a privilege, not a right. *In re La Providencia Development Corp.,* 406 F.2d 251, 252 (1st Cir. 1969).

Because Weyerhaeuser has no constitutional right to remove a case to federal court based on diversity of citizenship, the Court of Appeals' dismissal on *forum non conveniens* grounds conditioned upon Weyerhaeuser's stipulation to litigate in Arkansas state court does not implicate the unconstitutional conditions doctrine. Weyerhaeuser has failed completely to demonstrate that significant constitutional questions justify this Court's acceptance of review.

D. The Decision Does Not Raise an Issue of Public Interest.

Because the Court of Appeals' decision does not abridge any constitutional or other rights, Weyerhaeuser's argument that the Court of Appeals' decision constitutes a threat to other Washington

corporations is sheer hyperbole. *See supra* at 8-14. Weyerhaeuser's claim that the decision encourages the filing of "unrelated" cases in Washington also is unfounded. This case obviously relates to Washington, the home state of the defendant, where a number of pivotal witnesses live and key decisions were made. *See* CP 199-201, 222-224, 249 and 275-276. And generally, domestic corporations prefer to be sued in their home states. This is not a jurisdictional case, but one about which of two forums is more convenient. And the Court of Appeals' decision sought to send the case to Arkansas state court as long as Weyerhaeuser agreed to litigate it there – hardly a holding that encourages the filing of "unrelated" cases in Washington.

If the public interest is engaged at all by the Court of Appeals' decision, it is the public's interest in upholding that decision, which discourages contrived motion practice concerning a more convenient forum in service of a concealed strategy to prevent a plaintiff from living to attend his trial.

IV. CONCLUSION

For the foregoing reasons, this Court should deny the Petition expeditiously so that this case may proceed and Mr. Sales can have his day in court.

DATED this 8th day of August, 2007.

Matthew P. Bergman, WSBA #20894
Brian F. Ladenburg, WSBA #29531
Bergman & Frockt

John W. Phillips, WSBA #12185
Matthew Geyman, WSBA #17544
Phillips Law Group, PLLC

Attorneys for Plaintiffs/Respondents

CERTIFICATE OF SERVICE

I declare under the penalty of perjury under the laws of the State of Washington that I am over the age of 18 years, not a party to this action, competent to testify in this matter and that on August 8, 2007 I caused to be served one copy of Respondents' Answer to Petition for Review, as follows:

Diane J. Kero
Elizabeth P. Martin
Gordon Thomas Honeywell, et al.
600 University Street, Suite 2100
One Union Square
Seattle, WA 98104
(Via Hand Delivery)

DATED this 8th day of August, 2007.

By: _____
Carrie J. Krogh